

10 16

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE

DIVISION II

FILED
HAMMOND
2017 JUN -7 AM 8:51

STATE OF TENNESSEE

v.

HARLAN FERGUSON

)
)
)
)
)

No. 108894

KNOX COUNTY CRIMINAL COURT
KNOXVILLE, TN

UX

**MOTION TO DISMISS PRESENTMENT FOR FAILURE
TO PRESERVE BLOOD SPECIMEN OR SUPPRESS BLOOD SPECIMEN AND
TOXICOLOGY RESULTS**

Comes now the Defendant, by and through counsel, pursuant to U.S. Const. amend. VI and XIV; Tenn. Const. art. I, § 8 and 9; Tenn. Code Ann. § 55-10-408; *Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999), and their progeny, and respectfully moves this Honorable Court to dismiss all charges in the presentment against Mr. Ferguson for the State's failure to preserve the blood specimen in this case, or, in the alternative, to suppress said evidence and any test results associated thereto. In support of this Motion, Mr. Ferguson would show the following:

I. INTRODUCTION.

On February 3, 2016, at approximately 7:32 p.m., Harlan Ferguson was alleged to be the driver of a vehicle that was involved in an accident. Mr. Ferguson's fiancé, Sarah Howe, died as a result of the accident. Knox County Sheriff's Office (KCSO) officers had pursued the vehicle allegedly driven by Mr. Ferguson, arrived at the scene immediately after the accident, and pulled Mr. Ferguson from the vehicle. Mr. Ferguson sustained multiple serious injuries and was rushed to the University of Tennessee

Medical Center (UTMC) by ambulance, where he underwent multiple medical procedures. KCSO officers followed Mr. Ferguson to the hospital.

KCSO records indicate that at some point during the night, Mr. Ferguson was requested to voluntarily give a sample of his blood for legal purposes, and he refused. However, a "medical draw" was conducted at approximately 8:38 p.m. on February 3, 2016, in which a sample of Mr. Ferguson's blood was drawn without his consent, allegedly for medical purposes. These exact medical purposes are unknown. It is also unknown at whose request this blood specimen was taken, or who among personnel at UTMC took the blood specimen.

Because Mr. Ferguson had refused consent to voluntarily give a blood specimen, KCSO Lieutenant David Amburn obtained a search warrant in order to do a "legal draw" of Mr. Ferguson's blood. This search warrant was issued by Magistrate Sharon Frankenburg during the early hours of February 4, 2016. KCSO officers then obtained a sample of Mr. Ferguson's blood at approximately 4:16 a.m. on February 4, 2016, pursuant to the search warrant. The search warrant was executed and returned at approximately 5:12 a.m. the same morning.

Lieutenant Amburn later sought a search warrant to obtain the blood specimen taken from Mr. Ferguson pursuant to the medical draw, which was believed to be in possession of UTMC or LabCorp. This search warrant was issued by Magistrate Robert Cole on February 4, 2016, at approximately 4:30 p.m. The search warrant was executed and returned at approximately 6:15 p.m. the same day.

The two blood specimens taken from Mr. Ferguson—the blood specimen from the legal draw and the blood specimen from the medical draw—were taken to the

Tennessee Bureau of Investigation (TBI) Knoxville Crime Laboratory located at 1791 Neals Commerce Lane in Knoxville. The blood specimen from the medical draw was tested, but the blood specimen from the legal draw was reported to not be tested. Both samples were destroyed on September 1, 2016, before Mr. Ferguson was arrested, arraigned, or appointed counsel on these charges.

On August 30, 2016, more than six months after the accident, a presentment was filed in the Criminal Court for Knox County, Division II, Docket No. 108894, charging the Defendant, Harlan V. Ferguson, with the offenses of Vehicular Homicide, Evading Arrest, Reckless Endangerment, Driving Under the Influence, and Failure to Drive Within a Single Lane of Traffic. On September 20, 2016, Mr. Ferguson was taken into custody on these charges. On September 26, 2016, Mr. Ferguson was arraigned and the Office of the Public Defender was appointed to represent him.

By statute, Mr. Ferguson is entitled to a sample specimen for his independent testing. However, both samples have been destroyed. Nevertheless, the state was able to obtain a single toxicology report by testing a sample and then destroyed the underlying evidence. Now, it seeks to use the test results as evidence of intoxication at Mr. Ferguson's trial. Due to the State's destruction of the blood specimen taken from his body, these specimens are no longer available for examination or testing by the defense. As a result, the State's conduct has materially impaired Mr. Ferguson's ability to defend against these charges, and Mr. Ferguson is deprived of a fundamentally fair trial. All counts of the presentment pending against Mr. Ferguson must be dismissed pursuant to *State v. Ferguson*, 2 S.W.3d 912, 915-916 (Tenn. 1999). In the alternative,

Mr. Ferguson moves to suppress the blood specimen and resulting toxicology reports.

State v. Merriman, 410 S.W.3d 779, 785 (Tenn. 2013).

II. THE STATE'S DESTROYED THE BLOOD SPECIMENS IN VIOLATION OF STATE V. FERGUSON AND THE DUE PROCESS CLAUSE, DEPRIVING MR. FERGUSON OF A FUNDAMENTALLY FAIR TRIAL

In *State v. Ferguson*, 2 S.W.3d 912, 915-916 (Tenn. 1999), our Supreme Court explained that "the loss or destruction of potentially exculpatory evidence may violate a defendant's right to a fair trial." *State v. Merriman*, 410 S.W.3d 779, 784 (Tenn. 2013) (citing *Ferguson*, 2 S.W.3d at 915–16. In *Ferguson*, the Court rejected the *Arizona v. Youngblood*, 488 U. S. 51 (1988), "bad faith" standard, instead enunciating a standard that asked whether a defendant's trial, conducted without the destroyed evidence, would be "fundamentally unfair." *Ferguson*, 2 S.W.3d 912, 914 (Tenn. 1999). Indeed, the Tennessee Supreme Court rejected the *Youngblood* "bad faith" approach on the ground that it fails to adequately protect the right to a fair trial under the Due Process Clause of the Tennessee Constitution. 2 S.W.3d 912, 916 (citing Tenn. Const. Art. I, §8). The *Ferguson* court then developed a three-step analysis to determine whether a trial without the destroyed evidence would be fair: (1) establishing whether the State had a duty to preserve the evidence, (2) determining if the State breached its duty to preserve evidence and (3) balancing several factors which should guide the decision regarding the consequences of the breach. *Id.* at 917. For the third step, the Court found that several factors should guide the decision, including the following:

1. The degree of negligence involved;
2. The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and
3. The sufficiency of the other evidence used at trial to support the conviction.

Id.

A. The State's Duty To Preserve Evidence

The first step in the *Ferguson* analysis is to determine whether the State first had a duty to preserve the destroyed evidence. The *Ferguson* Court found that the State has a general duty to preserve all evidence subject to discovery and inspection: "Generally speaking, the State has a duty to preserve all evidence subject to discovery and inspection under Tenn. R. Crim. P. 16, or other applicable law." *Ferguson*, 2 S.W.3d at 917; see also *State v. Merriman*, 410 S.W.3d 779, 785 (Tenn. 2013) (stating same). Moreover, the *Merriman* Court found that even when the State has no duty to gather evidence, but gathers that evidence anyway, the State then has a duty to disclose the evidence to the defendant pursuant to discovery and pursuant to the defendant's constitutional rights under *Brady v. Maryland*, 373 U.S. 83 (1963):

The State had no duty to create a video recording of Ms. Merriman's traffic stop. When the video was recorded, however, it became a part of the State's evidence against Ms. Merriman and its disclosure was required under Tennessee Rule of Criminal Procedure 16 and *Brady*.

Merriman, 410 S.W.3d at 794.

Specifically, the state has a duty to preserve "constitutionally material evidence" which has been described by the Court as "evidence that might be expected to play a significant role in the suspect's defense." *Ferguson*, 2 S.W.3d at 917 (quoting *California v. Trombetta*, 467 U.S. 479, 488 (1984)). The "loss or destruction of potentially exculpatory evidence may violate a defendant's right to a fair trial." *Merriman*, 410

S.W.3d at 784-85 (citations omitted). The Tennessee Supreme Court determined that due process, and therefore "fundamental fairness" considerations of both the U.S. and Tennessee Constitutions, requires a review and evaluation of "the effect of the State's failure to preserve evidence" in a criminal case. *Id*; see generally *Trombetta*, 467 U.S. at 485 (discussing "standard[s] of fairness ... require that criminal defendants be afforded a meaningful opportunity to present a complete defense[;] [therefore,] the Court ...developed...the area of constitutionally guaranteed access to evidence. [These] constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system.") (citations, quotations omitted).

1. Preservation of Blood Specimen Is Further Mandated By Statute

The state is further statutorily mandated to preserve the blood evidence collected from Mr. Ferguson and must do so for his independent testing. Tenn. Code Ann. § 55-10-408(e) (plainly stating defendant "shall be entitled to have an independent sample of blood . . . procured" and to independently test that specimen); Tenn. R. Crim. P. 16(a)(1)(F)(iii) (stating "the state shall permit" inspection if "the item was obtained from or belongs to the defendant" or the state "intends to use the item in its case-in-chief"); see generally *State v. Merriman*, 410 S.W.3d 779, 785 - 6 (Tenn. 2013) (citations omitted).

2. The State Had A Duty To Preserve Mr. Ferguson's Blood Specimens

Likewise, the State had a duty to preserve Mr. Ferguson's blood specimens so that Mr. Ferguson could independently test these specimens. There is no question that the blood specimen and its corresponding test results would play a significant role in Mr.

Ferguson's case. In fact, these specimens will be used to show elements of several of the offenses charged. The preservation of the blood sample is so vital that the legislature codified the state's duty to preserve such evidence. See Tenn. Code Ann. § 55-10-408(e); Tenn. R. Crim. P. 16(a)(1)(F)(iii) (stating "the state shall permit" inspection if "the item was obtained from or belongs to the defendant" or if the state "intends to use the item in its case-in-chief").

However, assuming *arguendo*, that the state is permitted to destroy the sample it tested, it was certainly not entitled to destroy Mr. Ferguson's sample as well. *Id.* The first step of the *Ferguson* analysis has been met – the state had a duty to preserve the seized evidence at issue.

There is no question that the destroyed blood specimen contained material evidence. The results of the tests in this case will be used as direct proof. Conversely, the specimen may have contained potentially exculpatory evidence for the defense. In addition, the destroyed evidence included highly significant impeachment material for the defense. That is, the defense will not be able to fully and properly impeach the analyst who tested the state's specimen. Instead, the jury would rely on the single toxicology report alone. This forecloses the Defendant's opportunities for confrontation and cross-examination. See generally *United States v. Bagley*, 473 U.S. 667, 681, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985) (discussing materiality standard); *Kyles v. Whitley*, 514 U.S. 419, 450, 115 S. Ct. 1555, 1573, 131 L. Ed. 2d 490 (1995) (stating when the suppressed evidence has "some value as [to] exculpation and impeachment ... it counts accordingly in determining whether *Bagley*'s standard of materiality is satisfied).

When considering the materiality issue under *Ferguson*, the trial court's analysis should also include the question of whether the defendant has a way of obtaining other "comparable evidence" in his case. *Ferguson*, 2 S.W.3d at 918. Here, Mr. Ferguson has no possible way of obtaining "comparable evidence" at all – considering the *State destroyed the only comparable evidence he could have possibly had*. See Tenn. Code Ann. § 55-10-408 (e). Plainly, there are no "options" or alternatives for the defendant – the blood samples do not exist – and thus the *Ferguson* analysis proceeds accordingly.

B. The State Failed In Its Duty To Preserve The Blood Specimens

After the court recognizes the state's duty to preserve the constitutionally material evidence, the second step, under *Ferguson*, requires the court to determine whether the state "failed in its duty." *Ferguson*, 2 S.W.3d at 917. The state did fail in its duty to preserve the blood specimen in this case. The blood specimen contained potentially exculpatory evidence, therefore, "negligence by the state is presumed." *Merriman*, 410 S.W.3d at 793. Contrary to statute, the state destroyed Mr. Ferguson's sample as well, although his right to inspect the evidence is codified. See Tenn. Code Ann. § 55-10-408. Moreover, the State destroyed the blood specimens before Mr. Ferguson even had an opportunity to request that the blood specimens be preserved, because the State destroyed the blood specimens two days after the grand jury filed a presentment against Mr. Ferguson, and weeks before Mr. Ferguson was arraigned on the charges in the presentment and appointed an attorney.

C. Dismissal Of All Charges In The Presentment Is The Appropriate Remedy

The third step in the *Ferguson* analysis includes balancing several factors to determine the consequences of the State's failure to preserve evidence. "If the trial

court concludes that a trial would be *fundamentally unfair*” because of the destruction, then the trial court may “impose an appropriate remedy to protect the defendant's right to a fair trial, including, but not limited to, *dismissing the charges . . .*” *Merriman*, 410 S.W.3d at 785–86 (emphasis added). If the State had a duty to preserve evidence and failed in that duty, the trial court must consider the following factors to determine the consequences of that failure: “(1) [t]he degree of negligence involved; (2) [t]he significance of the destroyed evidence considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and, (3) [t]he sufficiency of the other evidence used at trial to support the conviction.” *Ferguson*, 2 S.W.3d at 917. *Merriman* noted that, despite the third factor's focus on evidence presented at trial, such a motion could be filed pre-trial, and would involve the trial court “weigh[ing] the significance of the lost evidence in light of the other evidence and to determine an appropriate remedy.” See also *State v. Dustin Wayne Capps*, 2009 WL 690685 (Tenn. Crim. App. Mar. 13, 2009) *abrogated on other grounds by State v. Merriman*, 410 S.W.3d 779 (Tenn. 2013) (dismissal of charges where videotape that directly captured the alleged aggravated robbery was destroyed, not pursuant to standard procedure).

1. “[t]he degree of negligence involved:”

Blood evidence plays a significant role in DUI cases. Such evidence is routinely seized, preserved, and tested. In this case, the defense's sample was destroyed. The destruction occurred well before Mr. Ferguson was arraigned on the presentment and appointed a lawyer.

The State should not be allowed to institute a regime whereby it seizes evidence, tests it for inculpatory information, presents that evidence to the grand jury and then destroys it. It is also improper for it to then destroy the Defendant's evidence as well. See Tenn. R. Crim. P. 16(a)(1)(F)(i)-(iii). Given the timing of these events and the subsequent destruction of all of the seized blood evidence in this case, these actions indicate either exceptional carelessness amounting to gross negligence or intentioned action.

This is not forgivable negligence in the sense of some overlooked item of evidence of dubious relevance mistakenly falling through the cracks. The State's course of action in this case weighs strongly in favor of dismissal.

2. "[t]he significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available:"

As to the second factor, there is no "secondary" or "substitute" evidence available in this case. Here, the probative value of the blood evidence is high because it goes to the elements of the crimes charged.

The State will present the TBI's toxicology report although it destroyed the underlying evidence that formed the basis of its finding. It also destroyed the "secondary or substitute evidence" even though it belonged to Defendant and he was statutorily entitled to it. See Tenn. Code Ann. § 55-10-408 (e); Tenn. R. Crim. P. 16(a)(1)(F)(i)-(iii). The defense has forever lost the ability to double-check the quality of the State's investigation and accuracy of testing of the blood specimens. See *State v. Stephens*, 529 S.W.2d 712, 713 (Tenn. 1975) (a defendant should not be forced to rely on the State's analysis of the evidence in a case). Because of the significance of this

evidence, the State's course of action weighs strongly in favor of dismissal in this factor as well.

3. "and [t]he sufficiency of the other evidence:"

The third factor used in determining the appropriate remedy is the sufficiency of the remaining evidence. As established above, there is no other comparable evidence for the defense and thus the evidence "bec[omes] more significant." *Merriman*, 410 S.W.3d at 795. Here, the Court should consider that there is no video recording or other recording of the initial chase of the vehicle allegedly driven by Mr. Ferguson; no video recording or other recording of officers' interactions with Mr. Ferguson after officers came into contact with him; no recording of the alleged interview between Mr. Ferguson and officers at the hospital; and no vehicle, because the vehicle involved in the accident was also destroyed due to the State's actions as well. (See Motion To Dismiss For Failure To Preserve Vehicle, previously filed in this case.)

The blood specimens in question are not circumstantial evidence. Instead, it will be offered by the state as direct proof of more than one of the elements of the offenses charged. (See Presentment, Counts 1-2 and 4-8.) However, as a result of the state's destruction, Mr. Ferguson cannot challenge the evidence in his case although the laws of this state have provided him with the ability to do so. This is fundamentally unfair and violates due process. *Merriman*, 410 S.W.3d at 795-96.

The destroyed evidence at issue relates to all charges in Mr. Ferguson's presentment. The State had a duty to preserve the blood specimens in Mr. Ferguson's case and failed in its duty to preserve them. Because of the State's destruction of the evidence in Mr. Ferguson's case before Mr. Ferguson was even arraigned on these

charges, Mr. Ferguson's trial will be rendered fundamentally unfair. Mr. Ferguson will suffer grave prejudice should he be forced to proceed to trial without this evidence. Likewise, he will be foreclosed on properly impeaching the State's witnesses just as he is constitutionally entitled to do so. U.S. Const. amend. VI, XIV; Tenn. Const. art. I, §§ 8, 9. The only appropriate remedy is the dismissal of all charges in the presentment, or in the alternative, suppression of the blood specimens and any resulting toxicology reports.

III. THE STATE'S DESTRUCTION OF THE BLOOD SAMPLES VIOLATES FEDERAL DUE PROCESS

As noted above, under Tennessee law a showing of bad faith is not required. In this case, however, it is apparent that the State acted in bad faith and therefore a trial conducted in these circumstances would violate federal due process as well. See *Moldowan v. City of Warren*, 578 F.3d 351, 385 (6th Cir. 2009). Here, the State had reason to believe that the blood specimens in this case were important evidence and that the defense would need to inspect the blood specimens. It nonetheless deliberately chose, through its action, to allow the blood specimens to be destroyed two days after the presentment was filed by the grand jury in Mr. Ferguson's case. It allowed the blood specimens to be destroyed before Mr. Ferguson was arrested, arraigned, or appointed an attorney on the charges in the presentment. The State was aware that at the time the blood samples were destroyed, Mr. Ferguson was powerless to defend himself against any charges, or even to request that the blood specimens be preserved.


IV. CONCLUSION


In light of the importance of this evidence and the egregious nature of the State's actions, the only appropriate remedy would be to dismiss all counts in the presentment against Mr. Ferguson. Any trial conducted in these circumstances, where the actions of the State have served to gratuitously deny the defense access to crucial evidence, would not produce a reliable and fair result as guaranteed by the Tennessee Constitution.

WHEREFORE, Mr. Ferguson respectfully moves this Honorable Court to conduct an evidentiary hearing on this matter and accordingly dismiss the presentment or, in the alternative, prohibit the State from introducing any evidence related to the blood specimen seized and tested in this matter by suppressing the evidence and any tests results related thereto.

RESPECTFULLY SUBMITTED,

MARK E. STEPHENS
PUBLIC DEFENDER, SIXTH JUDICIAL DISTRICT

BY: 
CHRISTY MURRAY, BPR # 020836
ASSISTANT DISTRICT PUBLIC DEFENDER
1101 Liberty Street
Knoxville, TN 37919
Phone: (865) 594-6120


KATHRYN FRASER, BPR # 034240
ASSISTANT DISTRICT PUBLIC DEFENDER
1101 Liberty Street
Knoxville, TN 37919
Phone: (865) 594-6120